Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-70

WILKES COUNTY, GEORGIA; HENRY HARRIS, CHAIRMAN; GERALD NORMAN, MARSHALL SHERRER, GEORGE NORMAN, AND JOHN LINDSEY SMITH, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF WILKES COUNTY, GEORGIA,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

WILKES COUNTY SCHOOL DISTRICT; WILLIS LINDSEY, AS CHAIRMAN, AND C. H. RANDALL, CORRIE MAXWELL, DR. MARVIN R. CLAYTON AND JAMES E. ECHOLS, AS MEMBERS OF THE WILKES COUNTY BOARD OF EDUCATION,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

In compliance with Rules 13 and 15 of this Court, Wilkes County, Georgia, et al., Appellants in Case No. 76-1045, below, and Wilkes County School District, et al, Appellants in Case No. 76-1046 below, submit herewith this jurisdictional statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment rendered by a three-judge court, convened pursuant to Section 5 of the Voting Rights Act of 1965, 42 USCA 1973c, granting summary judgment to the United States, and dismissing plaintiffs' complaint for a declaratory judgment, seeking an adjudication that 1972 laws of the State of Georgia, providing for county-wide voting for members of the Board of Commissioners and the Board of Education of Wilkes County, Georgia, did not have the purpose, and do not have the effect, of denying or abridging the right to vote on account of race or color, in contravention of the guarantees set forth in the Act.

OPINIONS BELOW

The opinion in both cases is attached hereto as "Appendix A". The judgment in Case No. 76-1045 is attached hereto as "Appendix B". The judgment in Case No. 76-1046 is attached hereto as "Appendix C".

BASIS OF JURISDICTION

I

Case No. 76-1045 below was a case brought by Wilkes County, Georgia, and the individual commissioners thereof, seeking a declaratory judgment pursuant to Section 5 of the Voting Rights Act of 1965, 42 USCA 1973c, adjudicating and declaring that an Act of the General Assembly of Georgia of 1972 (Ga. Laws 1972 Vol. II, p. 3337), changing the method of electing the 5 county commissioners from a district to a county at large basis, did not have the purpose, and does not have the effect, of denying or abridging the right to vote on account of race or color, within the meaning of the Act. Case No. 76-1046 below was a case brought by the Wilkes County School District, and the individual members of the 5-man Board of Education thereof, seeking a like adjudication with respect to a similar constitutional amendment of 1972 (Ga. Laws 1972 Vol. I, p. 1518), ratified November, 1972 (Ga. Laws 1973 Vol. I, p. 1780), applicable to the Board of Education. Both cases involved a change in the method of election of 5-man local governing bodies in Wilkes County, Georgia, from a district to a county-wide basis, and were both brought pursuant to Section 5 of the Act, 42 USCA 1973c, and the declaratory judgment statute, 28 USCA 2201. The two cases involve identical districts, facts and issues, and one jurisdictional statement is being filed as authorized by Rule 15(3) of the Rules of this Court.

II

The judgments were entered below on April 20, 1978. Notices of Appeal were filed May 31, 1978, in the District Court for the District of Columbia.

III

Jurisdiction of this Court on appeal is conferred by Section 5 of the Voting Rights Act, 42 USCA 1973c. A case believed to sustain the jurisdiction of the Court is *Beer v. United States*, 425 U.S. 130 (1976).

IV

The Georgia statutes the validity of which are drawn in question in this case were both enacted in 1972. The one applicable to the Board of Commissioners of Wilkes County provides in pertinent part as follows:

> "Any person, in order to be eligible for membership on the board to represent a Commissioner District, must reside in the district which he represents, and each member from a Commissioner District shall be voted on and elected by the voters of the entire county. When offering as a candidate for election to the board, a candidate must designate whether he is offering as a candidate from a district or as chairman." (Ga. Laws 1917, p. 436, as amended, Ga. Laws 1972 Vol. II, p. 3337).

The Act applicable to the Wilkes County Board of

Education, drawn in question here, was a local constitutional amendment, enacted in 1972, and ratified at the November General Election held that year. It provides:

> "The board of education shall be composed of two members from Education District No. 1, designated as Position No. 1 and Position No. 2; one member from Education District No. 2; one member from Education District No. 3 and one member from Education District No. 4. Any person, in order to be eligible for membership on the board to represent an Education District must reside in the district which he represents and each member shall be voted on and elected by the voters of the entire county. When offering as a candidate for election to the board, a candidate must designate the district he seeks to represent and in the case of persons seeking election from Education District No. 1 shall specify when he qualifies if he seeks Position No. 1 or Position No. 2." (Ga. Laws 1972 Vol. I, p. 1518).

QUESTIONS PRESENTED

(1) Whether, in applying the standards of the Voting Rights Act to a change in election procedures, the district court is properly entitled to consider not only the validity of the change as made, but also to speculate that if not approved, the effect would likely be a reapportionment suit challenging the existing malapportioned district which might result in a new district election plan containing districts gerry-

mandered to favor black voters? Stated differently, is a district court applying the preclearance standards of Section 5 entitled to reject a change just because it does not maximize black voting power?

(2) Whether, in a proceeding brought by a sparsely populated county subject to the preclearance provisions of Section 5 of the Voting Rights Act for a determination upholding a change to county-wide voting made for the purpose of satisfying the one-man, one-vote requirements of the Fourteenth Amendment with respect to existing malapportioned districts, the district court is authorized to conclude that the plan was adopted for the purpose of denying or abridging the right to vote on account of race or color simply because other available options existed which would have enhanced black voting strength?

(3) Whether a district court in applying the standards of the Voting Rights Act in a Section 5 preclearance proceeding erred in concluding that the change to county-wide voting, adopted to satisfy the one-man, one-vote requirements with respect to existing malapportioned districts, did not satisfy Section 5 because black citizens, although not constituting a majority of registered voters in any district or in the county as a whole, did constitute 37% in one district, and 34.57% in another district, as against 29.85% in the County as a whole?

(4) Whether the district court erred in finding, contrary to the evidence and law, that plaintiff had failed to carry the burden of showing that the two 1972 Georgia laws, changing the method of electing four

members of the Board of Commissioners and four members of the Board of Education, of Wilkes County, Georgia, from a district to a county-wide basis, did not have the purpose, and do not have the effect, of denying or abridging the right to vote on account of race or color, and in dismissing the two complaints with prejudice.

(5) Whether the district court used in resolving contested issues of fact on summary judgment, and in granting judgment for the United States, and dismissing the complaints of plaintiffs?

STATEMENT OF THE CASE

In these two companion cases below, Wilkes County, Georgia, and its Board of Education brought actions under Section 5 of the Voting Rights Act of 1965, 42 USCA 1973c, seeking preclearance of two Acts of the Georgia General Assembly adopted in 1972 changing the method of electing four of the members of the Board of County Commissioners and four of the members of the County Board of Education from a district to an at large basis.

In Case No. 76-1045 below, the County sought preclearance with respect to an Act affecting the County Commissioners. (Ga. Laws 1972 Vol. II, p. 3337). In Case No. 76-1046 below, the Wilkes County School District acting through the Board of Education, sought preclearance with respect to an Act affecting the Board of Education. (Ga. Laws 1972 Vol. I, p. 1518). Both boards have five members; both boards as con-

stituted by 1958 acts[1] involved four identical districts of the County, in which only the voters in each elected one member, with the Chairman being elected county-wide; and the laws governing both were revised in 1972 to retain the four districts for residency purposes. but to require county-wide voting with respect to all positions, after the decision of this Court in *Hadley v. Junior College District*, 397 U.S. 50, 56 (1970), holding the one-man, one-vote principle applicable to such local governing bodies, had indicated the invalidity of the 4 malapportioned districts.[2]

Wilkes County is a rural, sparsely populated county having a population of only 10,184, according to the 1970 Census, of which 4813, or 47%, are black. Although constituting approximately 42.5% of the voting age population, blacks constitute only 29.9% of the registered voters as of August, 1977. With respect to the four malapportioned districts, the percentages of black registered voters are as follows:

District 1.	34.6%
2.	6.0%
3.	29.8%
4.	37%

(Findings of Fact, Table I)

1 Board of Education, Ga. Laws 1958 Vol. I, p. 460; Board of Commissioners, Ga. Laws 1958 Vol. II, p. 2091.

2 The only difference in the 1972 acts was that with respect to the County Commissioners, the Chairman continued to run and be elected county-wide, as under the 1958 Act, whereas, with respect to the Board of Education, the law was also changed to require election of two members from the most populous district, voted on county-wide, with the Board itself electing the Chairman. See Ga. Laws 1972 Vol. I, p. 1518. Another difference, although not significant to the issues here, is that a 1967 Act provided for staggered terms for the Commissioners (Ga. Laws 1967 Vol. II, p. 2499).

It is thus seen that blacks constitute a greater percentage of the registered voters in two districts (by 7% in one, and by 5% in another) than they do in the county as a whole, and this was one ground relied upon by the district court below for denying relief to the plaintiffs.

With respect to the reasons for the 1972 change to county-wide voting, the only evidence before the Court was, with respect to the Commissioners, an extract from the minutes of a Commissioners' meeting where the representative in the General Assembly from Wilkes County appeared before the Commissioners and suggested that the law be changed to provide for county-wide voting "in accordance with the recent court ruling . . ." (Apparently referring to *Davis v. Thomas County, Georgia* (D.C. Ga. 1966), aff'd. 380 F2d 93 (C.A. 5th 1967)). As to the Board of Education, the evidence of record was deposition testimony of a former Chairman of the Board of Education to the effect that the reason for the change was to satisfy the one-man, one-vote requirement (Dep. of Hal Shank, p. 5). The district court, however, rejected this evidence, finding that the changes nevertheless were for the purpose of depriving black voting rights because (1) members of the black community were not consulted (nor is there any evidence that the white community was consulted) and (2) "The record demonstrates that available options for satisfying one person, one vote requirements that would enhance black voting strength were not considered" (Findings, No's. 12 and Conclusions, No's. 8).

The district court placed great reliance upon the fact

that regardless of the validity of the 1972 changes *per se*, their rejection would result in falling back on the 1958 constructed districts which because of their being in patent violation of the one-man, one-vote principle, would necessitate reapportionment with a consequent redistricting, which the Court speculated might result in gerrymandered districts designed to maximize black voting power (Findings, No's. 12, Conclusions, No's. 8 and 10).

The undisputed evidence was to the effect that blacks experience no difficulty in registering or voting in Wilkes County; there is no formal slating of candidates with the result that no one, blacks included, has any difficulty in getting on the ballot; that Wilkes County has an unusually liberal registration procedure for blacks, consisting of 3 black "floating" deputy registrars, (one of whom is head of the local NAACP) who can register voters anywhere and at anytime; that there is no timidity or reluctance on the part of blacks to register or vote, only apathy; that white candidates solicit black votes, and race is not an issue in elections; that there are 15 polling places in this small county, some containing as few as 20 registered voters; that even when the literacy test was in use, it was administered fairly and liberally toward blacks; and that officials in the county have been responsive to black needs. On the other hand, within the memory of the present board members, no blacks have been elected to local offices, although 3 have offered unsuccessfully since 1966.

In both cases, the district court below concluded that plaintiffs had failed to carry the burden, and concluded

without supporting evidence, that the percentage of black registration was due to past discrimination in voting, to the control of the election machinery by white officials, and to the County-wide voting plan.

THE QUESTIONS ARE SUBSTANTIAL

In this case, as in *Beer v. United States*, 425 U.S. 130 (1976), the United States District Court for the District of Columbia was obsessed with the notion that in passing on preclearance cases under Section 5 of the Voting Rights Act, the only acceptable plan is one which maximizes black voting power to the greatest extent possible. That contention was rejected by this Court there, and it should be rejected here once again. In this case, the Court below applied this doctrine in two ways: *First*, the Court concluded that the mere rejection by the two boards below of an alternative plan which would have accorded blacks greater voting strength, (district election) necessarily established that the purpose of the 1972 change to county-wide voting was to discriminate on the basis of race. Rejected entirely was undisputed evidence that the sole reason for the change was to satisfy the one-man, one-vote principle with respect to the malapportioned four districts by permitting county-wide voting.[3] *Second*,

3 Another self-evident reason, although not developed by the evidence below, is the fact that Georgia counties are divided geographically and for voting purposes on a militia district basis, Ga. Code §§23-201 et seq.; 34-701, Williamson Dep., pp. 7-8, and retention of equal population districts in a small county like Wilkes would require decennial revision of election district lines along an entirely different basis than militia districts, which now are organized without regard to population. This continuous rejuggling of district lines, with all of the political turmoil it involves, simply is not worth the cost in a county having an electorate no larger than Wilkes County.

the Court held that in determining the validity of the 1972 change, it was authorized not only to consider the plan as enacted, but also to consider that the likely result of court disapproval would be a reapportionment case, revising the districts along single-member lines, with one or more districts structured so as to maximize the voting strength of blacks. In other words, the court engaged itself in the election rigging business. In this, the district court has disregarded clear cut decisions of this Court, for the Constitution does not mandate a system of proportional representation. *Whitcomb v. Chavis*, 403 U.S. 124, 156 (1971). "A minority 'is not constitutionally entitled to an apportionment structure designed to maximize its political advantage', *Gilbert v. Sterrett*, 5 Cir. 1975, 509 F.2d 1389, 1394. Members of a minority group have no federal right to be represented in legislative bodies in proportion to their numbers in the general population. *Beer v. United States*, . . ." *Pannior v. Iberville Parish School Board*, 536 F.2d 101, 104 (C.A. 5th 1976). The Constitution does not require, where there is evidence of racial bloc voting, that black voters elect at least some candidates of their choice regardless of their percentage turnout. *Nevett v. Sides*, 533 F.2d 1361, 1365 (C.A. 5th 1976).

The District Court has also decided another important question relating to the proper standards applicable under Section 5 of the Act, 42 USCA 1973c. While the holdings referred to above relate to the "purpose" part of the Section 5 test, the holding now to be discussed relates to the "effect" language of Section 5. Regardless of whether, in order to preserve the constitutionality of the language of Section 5 relating to

laws which "have the effect of denying or abridging the right to vote on account of race or color," the language must be construed as nevertheless embracing the presence of a "purpose to discriminate", *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Dayton Board of Education v. Brinkman*, 53 L.Ed.2d 851, 859 (1977); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Metropolitan School District v. Buckley*, 429 U.S. 1068 (1977); *Austin Indep. School District v. United States*, 429 U.S. 990 (1976); and compare, *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973); *Paige v. Gray*, 538 F.2d 1108, 1110 (C.A. 5th 1976); *Black Voters v. McDonough*, 565 F.2d 1, 4, f.n. 6 (C.A. 1st 1977), the District Court here has adopted a rigid, mathematical test which holds that any change which results in new districts having even a few percentage points less of black registered voters than the existing districts violates Section 5, regardless of whether the difference is likely to have any practical effect. Section 5 reaches only a change which leads "to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise". *Beer v. United States*, 425 U.S. 130, 141 (1976). While blacks constitute a numerical majority in two of the four districts, and only 47% of the population in the county as a whole, registered voters, not total population, is the controlling factor in election cases. *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 150 (C.A. 5th 1977). None of the 4 old districts have a majority of registered voters, and while two districts have a majority of registered voters, and while two districts have a larger percent of registered voters (34.6% and 37%) than the county as a whole (29.85%), it is not

every law which diminishes in any way the political power of blacks which is condemned, *City of Richmond v. United States*, 422 U.S. 358, 371 (1975), for Congress did not intend to prescribe a standard so exacting that no changes in voting laws would be permissible. *City of Petersburg v. United States*, 354 F. Supp. 1021, 1030 (D.C. D.C. 1972), aff'd. 410 U.S. 962 (1973). It is submitted that seven percentage points is not enough to make a constitutional difference, as the Constitution does not concern itself with "gossamer possibilities of prejudice". *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

The Court below erred in granting summary judgment to the United States, and in dismissing the Complaints with prejudice.

Respectfully Submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILKES COUNTY, GEORGIA *et al.*,
Plaintiffs,

versus C.A. No. 76-1045

UNITED STATES OF AMERICA,
Defendant.

WILKES COUNTY SCHOOL DISTRICT *et al.*,
Plaintiffs,

versus C.A. No. 76-1046

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed: APR. 20, 1978

Findings of Fact

1. The Board of Commissioners of Wilkes County, Georgia, is the governing body of Wilkes County, one

of 159 counties of Georgia, Ga. Code § 23-101, and the Board of Education is the governing body of the Wilkes County School District, a school district under the law of the State of Georgia. The State of Georgia is subject to the prohibitions of Section 4(a) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973b(a). Complaint and Answer, paragraphs 1 and 3;[1] 30 Fed. Reg. 9897 (Aug. 6, 1965).

2. The Board of Commissioners consists of a chairman and four other members, all selected for office by election. As of November 1, 1964, the chairman was elected at large and the four other members were elected from single-member districts; terms of office were not staggered. Ga. Laws 1958, Vol. II, p. 2091. Complaint and Answer, paragraph 7, No. 76-1045.

3. In 1967, effective in 1970, the terms of office for the Board of Commissioners became staggered. In 1972, the electoral system was changed so that the four members besides the chairman would be elected at large, while still required to reside in the districts previously used. In 1975, the electoral system for the Board of Commissioners was recodified. A majority vote is required for nomination for the Board of Commissioners. Ga. Laws 1972, Vol. II, p. 3337; Ga. Laws 1975, Vol. II, p. 1979. Complaint and Answer, paragraph 7, No. 76-1045. Ga. Code Sec. 34-1513.

4. The practices and procedures for the election of the Board of Commissioners different from those in

1 Unless otherwise indicated, citations to the record will be to documents in the record of both cases.

effect on November 1, 1964 have not received administrative preclearance pursuant to Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c. Complaint and Answer, paragraph 14, No. 76-1045.

5. The Board of Education consists of a chairman and four other members, all selected for office by election. As of November 1, 1964, the chairman was elected at large and the four other members were elected from single-member districts. Ga. Laws 1958, Vol. I, p. 460. Complaint and Answer, paragraph 7, No. 76-1046.

6. In 1972, the electoral system for the Board of Education was changed so that all members would be elected at large, with each member required to reside in one of the four districts and with two members, elected from posts, to be residents of election district 1, the most populous district. A majority vote is required for nomination for the Board of Education. Ga. Laws 1972, Vol. I, p. 1518. Complaint and Answer, paragraph 7, No. 76-1046. Ga. Code Sec. 34-1513.

7. The practices and procedures for the election of the Board of Education different from those in effect on November 1, 1964, have not received administrative preclearance pursuant to Section 5 of the Voting Rights Act. Complaint and Answer, paragraph 14, No. 76-1046.

8. Relevant statistical data from the record and from the 1970 census with respect to the population and number of registered voters, by race, for the four districts of the county previously used as single-member districts and now used as residency districts are presented in the following table:

Table 1. Population and Registered Voters by Election District

Election District	Total Population Number[1]			Percentage[2]		Voting Age Population[3] Number			Percentage		Registered Voters (August 1977)[4] Number			Percentage	
	Total	White	Black	White	Black	Total	White	Black	White	Black	Total	White	Black	White	Black
1	4818	2342	2476	48.6	51.4	3132	1683	1449	53.8	46.2	2418	1582	836	65.4	34.6
2	1610	1078	532	67.0	33.0	1085	774	311	71.3	28.7	731	687	44	94.0	6.0
3	1691	916	775	54.2	45.8	1112	658	454	59.2	40.8	870	611	259	70.2	29.8
4	2065	1002	1063	48.5	51.5	1342	720	622	53.7	46.3	845	532	313	63.0	37.0
Total	10184	5338	4846	53.0	47.0	6671	3835	2836	57.5	32.5	4864	3421	1452	70.1	29.9

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1 Complaint, Exhibit E, No. 76-1045; Complaint Exhibit B, No. 76-1046; both corrected by Exhibit A to Plaintiffs' Reply Brief. It is assumed that all of enumeration district 12 is contained in election district 1.

2 Plaintiffs' Reply Brief, p. 6.

3 Bureau of the Census, 1970 Census of Population, General Population Characteristics, Georgia, table 35. Because census enumeration district statistics are not broken down into the necessary age classifications — see Exhibit B to Plaintiffs' Reply Brief — the statistics for the election districts assume that the age distribution is constant throughout the county.

4 Exhibit A to Plaintiffs' Reply Brief; Plaintiffs' Exhibit 3, Deposition of Edna J. Andrews Secretary to Board of Registrars, Wilkes County.

9. Election returns and corresponding voter registration data, from the record, for elections since 1964 in which there have been black candidates are presented in the following tables:

Table 2. Election Results in Contest Involving Black Candidates (1976)

Election District	Militia District	Registered Voters[1]		Primary Election, Board of Commissioners, August 10, 1976 Votes for[2]		Run-off Primary Election, Board of Commissioners, August 31, 1976 Votes for[2]	
		White	Black	White Candidate(s)	Black Candidate	White Candidate	Black Candidate
1	164	1677	859	1239	541	852	492
2	174	130	14	91	22		
	175	296	27	239	24		
	176	121	46	85	49		
	177	84	34	65	22		
Total		2308	980	1719	658	852	492

1 Plaintiffs' Answers to (First) Interrogatories by United States, No. 8.

2 *Id.*, No. 9, No. 76-1045.

5a

Table 3. Election Results in Contests Involving Black Candidates (1966)

Election District	Militia District	Registered Voters[1]		Primary Election, Board of Education, 1966 Votes for[2]	
		White	Black	White Candidate	Black Candidate
1	164	1895	610	1227	362

1 Plaintiffs' Responses to Requests for Admission of United States, No. 9; Exhibit A to Plaintiffs' Reply Brief. For the estimate of the number of registered voters by race in District 1 in 1966 — for which only countywide statistics are in the record — it is assumed that the proportion of white voters and black voters of the total number of white voters and black voters was the same in 1966 as it was in 1977.

2 Plaintiffs' Answers to (First) Interrogatories by United States, No. 9, No. 76-1046.

10. Although plaintiffs' witnesses have testified in a conclusory manner that race is not important in politics in the county, the evidence in the record requires the conclusion that racial bloc voting exists in the county and that black candidates receive little, if any, support from white voters. This conclusion is supported by the following evidence: voting pattern in election contests in which there are black candidates show that black candidates receive about the same number of votes as there are blacks registered to vote, or fewer; whites elected to office admit that black candidates will do better in black voting precincts than in white voting precincts; no blacks have been elected to office at least within recent decades, although blacks constitute 47 percent of the county's population; there have been very few black candidates for office; blacks have not been appointed to fill vacancies for elected offices; and, at least since 1964, none of the officers of the Democratic Party, whose nominees are invariably elected, have been black persons. Deposition of John W. Williamson, Jr., Probate Judge, pp. 9, 13-14; Deposition of George Norman, member Board of Commissioners, pp. 4-5, 8-11; Tables 1, 2, 3; Plaintiffs' Responses to Requests for Admission of United States, Nos. 1-3, 5, 6; Deposition of John O. Haney, former chairman, Board of Registrars, p. 17; Deposition of James A. Reynolds, Chief Registrar, p. 10; Plaintiffs' Answer to [First] Interrogatories by United States, Nos. 15, 16.

11. The record demonstrates that the populations of the four election districts in Wilkes County deviate substantially from ideal size. The population in each district and the deviation from the ideal are set out in the following tables:

Table 4. Deviation from Equal District Population
(Districts and Electoral System in Effect November 1, 1964)[1]

Election District	Population[2]	Ideal Size	Difference	Percentage
1	4818	2516	+2302	+91.5
2	1610	2516	-906	-36.0
3	1691	2516	-825	-32.8
4	2065	2516	-451	-18.3
Total	10184	-	-	+ or -127.5

1 Complaint and Answer, paragraph 7.
Table 1.

Table 5. Deviation from Equal District Population
(Districts and Electoral System for Wilkes County
School District, Ga. Laws 1972, Vol. I, p. 1518)[1]

Election District	Population[2]	Ideal Size	Difference	Percentage
1 (2 members)	4818	4074	+744	+18.3
2	1610	2037	-427	-21.0
3	1691	2037	-346	-17.0
4	2065	2037	+28	+1.4
Total	10184	-	-	+ or - 39.3

1 Complaint and Answer, paragraph 7, No. 76-1046.
2 Table 1.

12. The plaintiffs have alleged that the purpose of the electoral changes at issue was to satisfy one person, one vote requirements. However, these voting changes were made without the consultation of representatives of the black community, and the record demonstrates that available options for satisfying one person, one vote requirements that would enhance black voting strength were not considered. For example, population data by race for census enumeration districts demonstrate that if the county had been divided into fairly drawn single-member districts of equal population, the black population percentage in one district could have been as high as 71 percent. (Data for census enumeration districts from the 1970 census is contained in Exhibit B to Plaintiffs' Reply Brief.) Complaint, paragraph 8, both cases; Deposition of Hal P. Shank, former member, Board of Education, pp. 3-5; Plaintiffs' Answers to [First] Interrogatories by United States, Nos. 12, 13, 14, No. 76-1045, and No. 14, No. 76-1046.

13. The record also demonstrates that the selection of the at-large plan, which would diminish black voting strength in some areas of the county instead of a single-member district plan that might enhance black voting strength in some areas, was made shortly after black residents of Wilkes County began to register to vote in substantial numbers. As the following table indicates, black registration has not increased significantly since the change to at-large elections:

Table 6. Voter Registration by Race, 1962-1977

Year	Numbered of Registered Voters			Percentage of Total	
	Total	White	Black	White	Black
1962[1]	4022	3527	495	87.7	12.3
1966[2]	5147	4087	1060	79.4	20.6
1972[3]	4964	3610	1354	72.7	27.3
1974[4]	4434	3350	1084	75.6	24.4
1974[5]	4566	3428	1138	75.1	24.9
1977[6]	5091	3506	1585	68.9	31.1
1977 (Aug. 1977)[7]	4864	3412	1452	70.1	29.9

1 Plaintiffs' Responses to Requests for Admissions of United States, No. 7.

2 *Id.*, No. 9.

3 Complaint, Exhibit E, No. 76-1045; Complaint, Exhibit B, No. 76-1046.

4 *Id.*,

5 Plaintiffs' Responses to Request for Admissions of United States, Nos. 11 and 12.

6 Plaintiffs' Answers to (First) Interrogatories by United States, No. 8.

7 Exhibit A to Plaintiffs' Reply Brief; Plaintiffs' Exhibit 3, Deposition of Edna J. Andrews, Secretary to Board of Registrars.

14. On the basis of the evidence in the record, the Court is unable to conclude that the voting changes at issue were adopted without a racially discriminatory purpose.

15. The plaintiffs contend that the change to at-large elections has had a racially neutral effect because black voters were not in a position to control any of the malapportioned single-member districts. Although it is clear that, with the existence of bloc voting, black residents were not in a position to control any of the malapportioned districts, they could exert substantially greater influence in the malapportioned election districts 1 and 4 than they could under the at-large scheme; and, if the registration rate among black voters were to increase, that influence would be even greater.

16. The low percentage of black residents of voting age who are registered to vote is directly related to the following causes: to past discrimination in voting against black residents; to the failure of the elected officials to remedy the effects of that discrimination; to the virtual total control of the electoral process by white persons; and to the adoption of the at-large election plan at issue in these suits. Haney Deposition, pp. 3, 7, 10-11, 19, 20; Deposition of Bradley S. Armour, former member, Wilkes County Board of Registrars, pp. 3-7, 9; Reynolds Deposition, pp. 11-12; Deposition of Jean Daniel Beckum, Director, Department of Family and Children's Services, and former deputy registrar, pp. 3-4, 7-8, 10-12; Deposition of Edna J. Andrews, Secretary to the Board of Registrars, pp. 3, 10, 17-19, 21, 32; Williamson Deposition, pp. 3, 10-11, 17;

Plaintiffs' Answers to [First] Interrogatories by United States, Nos. 3 and 4; Plaintiffs' Answers to [Second] Interrogatories by United States, Nos. 1-4.

17. Although a comparison of the at-large plan with the malapportioned single-member district plan demonstrates that the effect of the voting change has been to diminish black voting strength (see Finding No. 15), the discriminatory effect is even more apparent where the at-large plan is compared with possible fairly drawn single-member district plans (see Finding No. 12).

18. If the system of election from single-member districts had been retained, it is probable that black residents of Wilkes County would have and would expect to have in the future a much greater influence in the political process than under the at-large system.

19. On the basis of this record the Court is unable to conclude that the voting changes at issue have not had a racially discriminatory effect.

20. The record demonstrates that under the current method of election, black residents have less opportunity than white residents to participate in the political process and to elect members of their choice to the Board of Commissioners and the Board of Education. If the single-member district system of election had been retained, it is reasonable to conclude that the opportunity for black residents to participate in the political process would have been greatly enhanced.

Conclusions of Law

1. This Court has jurisdiction to hear and determine these cases. Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c; 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 2201. *City of Petersburg v. United States*, 354 F. Supp. 1021, (D.D.C. 1972) affirmed, 410 U.S. 962 (1973).

2. This Court is properly convened as a court of three judges. Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c; 28 U.S.C. § 2284. *City of Petersburg v. United States, supra*, 354 F. Supp. at 1022.

3. Wilkes County, Georgia, and the Wilkes County School District are subject to the preclearance requirement of Section 5. Finding of Fact No. 1. *United States v. Board of Commissioners of Sheffield, Alabama*, 46 U.S.L.W. 4189, 4191 (U.S. March 6, 1978) (No. 76-1662); *United States v. Georgia*, 411 U.S. 526, 528 n.1 (1973).

4. Section 5 of the Voting Rights Act requires Wilkes County and the Wilkes County School District, before implementing any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in effect on November 1, 1964, to obtain a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a

language minority group or to obtain administrative preclearance for such qualification, prerequisite, standard, practice or procedure from the Attorney General. 42 U.S.C. § 1973c; 42 U.S.C. § 1973b(f)(2).

5. Methods of determining the constituency of an elected office and of determining the outcome of elections are practices or procedures with respect to voting within the meaning of Section 5. *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969); *Perkins v. Matthews*, 400 U.S. 379, 390, 394 (1971); *United States v. Board of Commissioners of Sheffield, Alabama, supra*, 46 U.S.L.W. at 4192-93, 4196.

6. The preclearance requirement of Section 5 is a constitutional exercise of the power granted to Congress by the Fifteenth Amendment to the Constitution. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 325-27, 334-35 (1966); *United Jewish Organizations v. Carey*, 430 U.S. 144, 156-57 (1977); *Beer v. United States*, 425 U.S. 130, 133 (1976).

7. In an action for a declaratory judgment under Section 5, the burden of proof is on the plaintiff. *South Carolina v. Katzenbach, supra*, 383 U.S. at 328, 335; *United States v. Georgia, supra*, 411 U.S. at 538.

8. The plaintiffs do not satisfy the burden of proving the absence of discriminatory purpose by merely stating that the change from elections from single-member districts to elections at-large was done to satisfy one person, one vote requirements. This is because the record demonstrates that alternate options for satisfying one person, one vote standards

were available and the record does not demonstrate the reason for selecting the at-large method over other options. Such is particularly true in this case since it appears that the at-large method would retain black voting strength at a minimum level while alternate options would enhance black voting strength. Plaintiffs have failed to meet their burden of demonstrating that the adoption of the voting changes at issue was done without a discriminatory racial purpose. Findings of Fact Nos. 12, 13, 14. *City of Richmond v. United States*, 422 U.S. 358, 378 (1975); *Nevett v. Sides*, No. 76-2951 (5th Cir., March 29, 1978) slip opinion, pp. 17-26.

9. The use of at-large elections in Wilkes County has the effect of abridging the right to vote of blacks on account of race or color by diluting and reducing the influence of blacks in elections for the Board of Commissioners and the Board of Elections compared to the use of the existing election districts. Finding of Fact No. 15. *Beer v. United States, supra*, 425 U.S. at 141; *City of Richmond v. United States, supra*, 422 U.S. at 370-71; *Allen v. State Board of Elections, supra*, 393 U.S. at 569.

10. Since the existing election districts are severely malapportioned, it is appropriate, in measuring the effect of the voting changes, to compare the voting changes with options for properly apportioned single-member district plans. Such a comparison clearly demonstrates that the at-large method has had a racially discriminatory effect. Finding of Fact No. 12. *City of Richmond v. United States, supra*, 422 U.S. at 370-71; *United Jewish Organizations v. Carey, supra*, 430 U.S. at 159-60.

11. The plaintiffs have failed to meet their burden of demonstrating that the voting changes at issue are nondiscriminatory in purpose and effect and thus plaintiffs are not entitled to the declaratory relief sought in this litigation. It is not necessary for this Court to determine whether the at-large election plan so discriminates on the basis of race as to violate the Fourteenth and Fifteenth Amendments to the Constitution. *Beer v. United States, supra*, 425 U.S. at 140-41.

An Order consistent with the foregoing Findings of Fact and Conclusions of Law has been entered this day.

/s/ J. SKELLY WRIGHT
J. Skelly Wright
United States Circuit
Judge

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District
Judge

/s/ JOHN H. PRATT
John H. Pratt
United States District
Judge

April 20th, 1978

APPENDIX "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILKES COUNTY, GEORGIA *et al.*,
Plaintiffs,

versus C.A. No. 76-1045

UNITED STATES OF AMERICA,
Defendant.

ORDER

Filed: APR. 20, 1978

The Court has considered plaintiffs' motion for summary judgment, defendant's motion for summary judgment, and the respective memoranda in support thereof. After hearing oral argument and there appearing to be no genuine issue of material fact, it is by the Court this 20th day of April, 1978,

ORDERED that:

(1) Defendant's motion for summary judgment be and hereby is granted;

(2) Plaintiffs' complaint for a declaratory judgment be and hereby is dismissed with prejudice; and

(3) Each party shall bear its own costs.

/s/ J. SKELLY WRIGHT
J. Skelly Wright
United States Circuit
Judge
/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District
Judge
/s/ JOHN H. PRATT
John H. Pratt
United States District
Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILKES COUNTY SCHOOL DISTRICT *et al.*,
Plaintiffs,

versus C.A. No. 76-1046

UNITED STATES OF AMERICA,
Defendant.

ORDER

Filed: APR. 20, 1978

The Court has considered plaintiffs' motion for summary judgment, defendant's motion for summary judgment, and the respective memoranda in support thereof. After hearing oral argument and there appearing to be no genuine issue of material fact, it is by the Court this 20th day of April, 1978,

ORDERED that:

(1) Defendant's motion for summary judgment be and hereby is granted;

(2) Plaintiffs' complaint for a declaratory judgment be and hereby is dismissed with prejudice; and

(3) Each party shall bear its own costs.

/s/ J. SKELLY WRIGHT
J. Skelly Wright
United States Circuit
Judge

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District
Judge

/s/ JOHN H. PRATT
John H. Pratt
United States District
Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILKES COUNTY, GEORGIA; HENRY HARRIS, Chairman; GERALD NORMAN, MARSHALL SHERRER, GEORGE NORMAN, and JOHN LINDSEY SMITH, as Members of the Board of Commissioners of Wilkes County, Georgia,
Plaintiffs,

versus C.A. No. 76-1045

UNITED STATES OF AMERICA
Defendant

NOTICE OF APPEAL

Filed: MAY 31, 1978

Notice is hereby given that Wilkes County, Georgia, et al., Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment entered herein on April 20, 1978, granting summary judgment to the United States and dismissing plaintiffs' complaint for a declaratory judgment pursuant to Section 5 of the Voting Rights Act of 1965, 42 USCA 1973c, adjudicating and declaring that an Act of 1972 of the General Assembly of Georgia, providing for county-wide voting for members of the Board of Commissioners of Wilkes County, Georgia, does not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race or color.

This appeal is taken pursuant to Section 4(a) of the Voting Rights Act and 28 USCA 2101(b).

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APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILKES COUNTY SCHOOL DISTRICT; WILLIS LINDSEY, as Chairman, and C. H. RANDALL, CORRIE MAXWELL, DR. MARVIN R. CLAYTON and JAMES E. ECHOLS, as members of the Wilkes County Board of Education

Plaintiffs

versus C.A. No. 76-1046

UNITED STATES OF AMERICA

Defendant

NOTICE OF APPEAL

Filed: MAY 31, 1978

Notice is hereby given that Wilkes County School District et al., Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final judgment entered herein on April 20, 1978, granting summary judgment to the United States and dismissing plaintiffs' complaint for a declaratory judgment pursuant to Section 5 of the Voting Rights Act of 1965, 42 USCA 1973c, adjudicating and declaring that an Act of 1972 of the General Assembly of Georgia, providing for county-wide voting for members of the

Board of Education of Wilkes County, Georgia, does not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race or color.

This appeal is taken pursuant to Section 4(a) of the Voting Rights Act and 28 USCA 2101(b).

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Supreme Court, U. S.
FILED
NOV 7 1978
MICHAEL RODAK, JR., CLERK

No. 78-70

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILKES COUNTY, GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

WILKES COUNTY SCHOOL DISTRICT, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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Solicitor General

DREW S. DAYS, III
Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-70

WILKES COUNTY, GEORGIA, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

WILKES COUNTY SCHOOL DISTRICT, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to this Court's Rule 16, the United States moves to affirm the judgments of the district court.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-17a) is reported at 450 F. Supp. 1171.

JURISDICTION

The opinion and judgments of the three-judge district court were filed on April 20, 1978. Notices of appeal to this Court were filed on May 31, 1978 (J.S. App. 21a-

24a), and the jurisdictional statement was filed on July 11, 1978. The jurisdiction of this Court is invoked under 42 U.S.C. (Supp. V) 1973c.

QUESTION PRESENTED

Whether appellants sufficiently showed that a state statute and local constitutional amendment changing the procedure for electing a county Board of Commissioners and Board of Education have neither a racially discriminatory purpose nor a racially discriminatory effect.

STATEMENT

1. Wilkes County, Georgia, is governed by a Board of Commissioners consisting of a chairman and four other members (J.S. App. 1a-2a).[1] Until 1958 the chairman of the Board was elected at-large and the remaining members were appointed by the county grand jury.[2] See 1917 Ga. Laws, at 436; Complaint, Civ. No. 76-1045 (D.D.C.), para. 7. At a referendum election in 1958, the voters of Wilkes County approved a local law that made all five positions on the Board elective.[3] The new law divided the county into four election districts and provided that the voters of each district should elect a resident of that district as a member of the Board. The 1958 law also

[1]Until 1968 county boards of commissioners in Georgia were known as county boards of commissioners of roads and revenues. See Ga. Code Ann. § 23-803 (1971 Rev.).

[2]General statutory provisions governing the composition and method of selection of county grand juries in Georgia are codified in Ga. Code Ann. ch. 59-2 (1965 and 1978 Supp.). The powers and duties of the county grand jury are set forth in Ga. Code Ann. ch. 59-3 (1965).

[3]The law had been adopted earlier in the year by the Georgia General Assembly. See 1958 Ga. Laws, at 2091-2095.

provided that the voters of the entire county should continue to elect the Board's chairman. In 1972 the Georgia legislature passed a local law providing that all five members of the Board should be elected at-large. The 1972 act retained the district residency requirement for the four Board members other than the chairman. See 1972 Ga. Laws, at 3337-3338.[4]

2. The Wilkes County School District is governed by a Board of Education consisting of a chairman and four other members (J.S. App. 2a-3a). Before 1958, all members of the Board of Education were appointed by the county grand jury, in accordance with the Georgia Constitution and the governing state statute. See Ga. Code Ann. § 2-5302 (1977 Rev.) (formerly § 2-6801 of the 1945 Georgia Constitution); and Ga. Code Ann. § 32-902 (1976 Rev.). In 1958 the Georgia legislature proposed, and the Wilkes County voters adopted, a local constitutional amendment that provided for the election of the members of the Board of Education. See 1958 Ga. Laws, at 460; Complaint, Civ. No. 76-1046 (D.D.C.), para. 7. The amendment divided the county into four election districts and stated that the voters of each district should elect a resident of that district as a member of the Board of Education. (The districts were the same as those established in 1958 for the election of members of the Board of Commissioners.) The 1958 amendment also provided that the voters of the entire county should elect the chairman of the Board of Education. In 1972 the

[4]In 1975 the Georgia legislature passed another local law that recreated the Wilkes County Board of Commissioners and consolidated earlier acts and amendments regarding the Board's powers and the method of selecting the Board's members. The 1975 law incorporated verbatim the portion of the 1972 act that provided for the at-large election of commissioners previously elected from individual districts. See 1975 Ga. Laws, at 2979-2985.

Georgia legislature proposed, and the Wilkes County voters adopted, a local constitutional amendment providing for the at-large election of all five members of the Board of Education. 1972 Ga. Laws, at 1518-1521. The amendment required that two members of the Board reside in District 1, the most populous district, and that one member reside in each of the other three districts. The amendment also provided that the Board should elect a chairman from among its members (J.S. 8 n.2; J.S. App. 3a).

3. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. (Supp. V) 1973c, prohibits a state or political subdivision covered by the first sentence of Section 4(b) of the Act, 42 U.S.C. (Supp. V) 1973b(b),[5] from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless the change has been precleared by the United States District Court for the District of Columbia or the Attorney General. A covered state or political subdivision wishing to implement a change in its voting practices or procedures may file suit in the United States District Court for the District of Columbia seeking a declaratory judgment that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." Alternatively, the state or political subdivision may submit the proposed change to the Attorney General

[5]On August 6, 1965, the Attorney General and the Director of the Census having made the necessary findings under Section 4(b), Georgia was designated as a covered jurisdiction under the Act. 30 Fed. Reg. 9897 (1965). See also *Georgia* v. *United States*, 411 U.S. 526, 528 n.1 (1973).

and may then proceed to enforce the change if the Attorney General does not object within 60 days after the submission.[6]

4. On April 8, 1976, the Wilkes County Board of Commissioners and Board of Education submitted the 1972 changes in their method of election to the Assistant Attorney General for the Civil Rights Division of the Department of Justice. The Boards sought preclearance under Section 5 of the Voting Rights Act for the shift to at-large election of all five members of each Board. On June 4, 1976, the Assistant Attorney General, on behalf of the Attorney General, interposed an objection to the use of at-large elections to choose commissioners and Board of Education members previously elected from single-member districts in Wilkes County. The Assistant Attorney General took this step because he was unable to conclude that the 1972 changes in the method of selecting members of the Boards would not have the effect of discriminating on account of race or color.

Shortly after their failure to obtain the desired preclearance from the Attorney General, Wilkes County and the Wilkes County School District filed suit in the United States District Court for the District of Columbia. They sought a declaratory judgment that the change from district to at-large voting in the election of four members of the Board of Commissioners and four members of the Board of Education did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color. On cross-motions for summary judgment, the three-judge district court, convened in accordance with Section 5 of the Voting

[6]The constitutionality of this procedure was upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). The standards governing the Attorney General's action on proposed voting changes are set forth in 28 C.F.R. 51.19.

Rights Act, granted summary judgment for the United States and dismissed the Wilkes County complaints with prejudice (J.S. App. 18a-19a).

The court found substantial population variation among the four districts that comprise Wilkes County (J.S. App. 4a, 7a).[7] During the years between 1958 and 1972, each of these districts elected one county commissioner, and one member of the Board of Education. Because of the districts' highly unequal population, public officials in Wilkes County were not elected in conformity

[7]The district court's findings concerning the total population, voting age population, and number of registered voters in Wilkes County, as distributed by district and by race, are reflected in the following tables (J.S. App. 4a):

Total Population

Election District	Number Total	White	Black	Percentage White	Percentage Black
1	4,818	2,342	2,476	48.6	51.4
2	1,610	1,078	532	67.0	33.0
3	1,691	916	775	54.2	45.8
4	2,065	1,002	1,063	48.5	51.5
Total	10,184	5,338	4,846	53:0	47.0

Voting Age Population

Election District	Number Total	White	Black	Percentage White	Percentage Black
1	3,132	1,683	1,449	53.8	46.2
2	1,085	774	311	71.3	28.7
3	1,112	658	454	59.2	40.8
4	1,342	720	622	53.7	46.3
Total	6,671	3,835	2,836	57.5	32.5 [*sic*; 42.5]

Registered Voters (August 1977)

Election District	Number Total	White	Black	Percentage White	Percentage Black
1	2,418	1,582	836	65.4	34.6
2	731	687	44	94.0	6.0
3	870	611	259	70.2	29.8
4	845	532	313	63.0	37.0
Total	4,864	3,421	1,452	70.1	29.9

with the "one person, one vote" principle. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), held that that principle applies to the popular election of local governmental officials. Appellants have indicated (J.S. 8, 9) that the shift to at-large elections in 1972 was designed, in the aftermath of *Hadley*, to remedy the malapportionment of the existing single-member districts. The district court found that adoption of the at-large election system as a substitute for more fairly apportioned single-member districts occurred "shortly after black residents of Wilkes County began to register to vote in substantial numbers" (J.S. App. 10a). The court also found that adoption of the at-large election system occurred "without the consultation of representatives of the black community" and without consideration of "available options for satisfying one person, one vote requirements that would enhance black voting strength" (*ibid.*). Since the change to at-large elections, black registration has not increased significantly (*ibid.*).

The district court stated that in Wilkes County candidates for public office nominated by the Democratic Party "are invariably elected" (J.S. App. 7a),[8] and that "at least since 1964, none of the officers of the Democractic Party * * * have been black persons" (*ibid.*). Within recent decades, no black person has been elected to public office in Wilkes County, despite the fact that blacks constitute 47% of the county's population (*ibid.*). After examining the results of a number of Wilkes County primary elections in which white and black candidates

[8]Under Georgia Law, Ga. Code Ann. § 34-1513 (1978 Supp.), a majority vote in a primary election is a prerequisite for nomination for public office, including seats on county boards of commissioners and boards of education. See J.S. App. 2a, 3a.

opposed each other, the district court found that "racial bloc voting exists in the county and that black candidates receive little, if any, support from white voters" (*ibid.*).

On the basis of this evidence, the district court was unable to conclude that the 1972 voting changes in Wilkes County did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color (J.S. App. 12a, 13a). The court acknowledged that "black voters were not in a position to control any of the malapportioned districts," but nevertheless determined that under the malapportioned single-member district scheme, black residents "could exert substantially greater influence" in Districts 1 and 4 than they could under the at-large system (J.S. App. 12a).[9] In this sense the court found that the 1972 shift to at-large elections diminished black voting strength.[10] In addition, the court found that adoption of the at-large election plan slowed black voter registration and thus helped maintain the low percentage of registered voters among the black voting age population.[11] In light of

[9]In August 1977, 34.6% of the registered voters in District 1 and 37.0% of the registered voters in District 4 were black. By contrast, only 29.9% of the registered voters in the entire county were black.

[10]The court also observed that "if the county had been divided into fairly drawn single-member districts of equal population, the black population percentage in one district could have been as high as 71 percent" (J.S. App. 10a). The court therefore concluded that if Wilkes County's malapportioned districts had been replaced with properly apportioned single-member districts rather than the at-large election scheme, "the opportunity for black residents to participate in the political process would have been greatly enhanced" (J.S. App. 13a).

[11]The district court's statistics (J.S. App. 4a) indicate that only about half of the black voting age population in Wilkes County is registered to vote, while nearly 90% of the white voting age population is registered.

appellants' failure to present any evidence explaining the decision to elect the Board of Commissioners and Board of Education at-large rather than from fairly apportioned single-member districts, the district court held that appellants did not "meet their burden of demonstrating that the voting changes at issue are nondiscriminatory in purpose and effect" (J.S. App. 17a). Accordingly, the court refused to grant the declaratory relief sought by appellants.

ARGUMENT

In a declaratory judgment action under Section 5 of the Voting Rights Act, plaintiffs bear the burden of proving that the proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328, 335 (1966). The three-judge district court in the present case correctly held that appellants failed to carry that burden. Applying the standards announced in *Beer* v. *United States*, 425 U.S. 130, 141 (1976), the district court ruled that the 1972 shift to at-large elections in Wilkes County had the effect of "diluting and reducing the voting strength exercised by blacks under the previously existing single-member districts, the district court held that failure to advance any explanation for their choice of an at-large election system rather than one of the other available methods of satisfying the "one person, one vote" requirement, the court found itself unable to conclude that the 1972 voting changes were adopted without a racially discriminatory purpose. The district court's refusal to grant the declaratory relief sought by appellants thus follows directly from a proper application of settled legal principles to the particular facts of this case. The judgment below should be affirmed.

1. Appellants did not prove that the adoption of an at-large election scheme in Wilkes County will not have the effect of denying of abridging the right to vote on account of race or color. Appellants do not challenge the district court's finding that racial bloc voting exists in Wilkes County. They apparently concede that under the at-large system black voters in the county have little or no chance of electing a candidate of their choice to either the Board of Commissioners or the Board of Education. They contend (J.S. 13-14), however, as they did in the district court (see J.S. App. 12a), that black voters' predicament under the at-large system is no worse than it was under the malapportioned single-member district scheme in effect between 1958 and 1972. Stressing that blacks do not constitute a majority of the registered voters in any of Wilkes County's four districts, appellants argue that black voters did not control and could not have expected to control any of the single-member districts. It follows, according to appellants, that the switch to at-large elections will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." See *Beer* v. *United States, supra,* 425 U.S. at 141; see also *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 159, 162-163 (1977) (plurality opinion). Because, under this Court's holding in *Beer,* Section 5 of the Voting Rights Act protects only against such retrogressions, appellants maintain that the district court should have granted the declaratory judgment they requested.

Appellants err in their assertion that the shift to at-large elections did not diminish the voting strength of blacks in Wilkes County. To be sure, given the district court's findings on the racial voting patterns that prevail in the county, the prospect of black voters electing a candidate of their choice to either the Board of Commissioners or the Board of Education was dim in the system of

malapportioned single-member districts that existed before the 1972 changes. But that prospect has been lessened (even without regard to the necessity of reapportionment) by appellant's decision to elect all members of both boards on an at-large basis. The August 1977 statistics in the district court's findings of fact (J.S. App. 4a; notes 7, 9, *supra*) reveal that 29.9% of the county's registered voters are black. In District 4 alone, however, blacks represent 37.0% of the registered voters, and in District 1, the most populous district, the comparable figure is 34.6%. Similar discrepancies also appear in the statistics concerning voting age population. While only 42.5% of Wilkes County's voting age population is black, blacks represent more than 46% of the voting age population in District 1 and in District 4. Moreover, blacks constitute a majority of the total population in both of those districts. Thus, the available information indicates that in District 1 and District 4 elections, black voters did exercise and would have continued to exercise an influence greater than they can exert in countywide elections.

At the time of the 1970 census, the black population of Wilkes County was considerably younger than the white population. The statistics reported in the census table cited by the district court (J.S. App. 4a n.3) suggest that by 1980 blacks probably will form a majority of the voting age population in District 1 and District 4.[12] If this population trend is accompanied by increased black voter registration, black voters in District 1 and District 4 might well be able to elect a candidate of their choice in single-

[12]At the same time, the likely increase in the black percentage of *countywide* voting age population will almost certainly be insufficient to offset completely the white majority position reflected in the 1970 census figures.

member district elections. The 1972 shift to at-large voting eliminates this potential and thus produces precisely the kind of retrogressive effect on a racial minority that *Beer* held impermissible.

Moreover, as the district court noted, in the absence of a change to a system of at-large elections, necessary reapportionment of the existing single-member districts is likely to enhance black voting strength in one or more of those districts. Since the need for periodic reapportionment is inherent in the use of single-member districting, it would be unrealistic to assess the effect of a change to an at-large system of elections without regard to the reapportionment of the single-member districts that otherwise must occur.

For all of these reasons, appellants' attempt (J.S. 13) to derive support from *Beer* is unavailing. The reapportionment plan sustained by this Court in *Beer* enhanced black voting strength. 425 U.S. at 141-142. In no sense can it be said that the 1972 change to at-large elections in Wilkes County had a similar effect. Indeed, as this Court has frequently observed, multimember districts "tend to submerge electoral minorities and over-represent electoral majorities." *Connor* v. *Finch*, 431 U.S. 407, 415 (1977); see also *Wise* v. *Lipscomb*, No. 77-529 (June 22, 1978) (White, J.), slip op. 4; *Chapman* v. *Meier*, 420 U.S. 1, 15-16 (1975). Appellants' reliance on *City of Richmond* v. *United States*, 422 U.S. 358 (1975), and *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973), is likewise misplaced. In those cases this Court approved cities' annexations of areas with predominantly white populations only because those annexations were accompanied by a shift from at-large voting to a single-member district system of electing local city councils. The Court explicitly acknowledged

(422 U.S. at 370) that "annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, [would have] created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council." *Richmond* and *Petersburg* therefore do not assist appellants' contention that the change to at-large elections in Wilkes County left black voting strength unaffected.

Citing *Washington* v. *Davis*, 426 U.S. 229 (1976), appellants suggest (J.S. 12-13) that, "in order to preserve the constitutionality of the language of Section 5," the statute's reference to discriminatory effect "must be construed as * * * embracing the presence of a 'purpose to discriminate.' " This assertion is completely without merit. *Washington* held that proof of an intent to discriminate is necessary to establish a violation of the Equal Protection Clause (426 U.S. at 242, 245). The Court's decision in that case did not even hint that Congress would be acting outside the limits of the Constitution if by statute it prohibited changes in voting standards, practices, and procedures whenever those changes have a discriminatory effect. In the present case, as in *Beer* (425 U.S. at 139; footnote omitted), "the question is not one of constitutional law, but of statutory construction." The language of Section 5 plainly indicates that an adverse racial effect alone is a sufficient basis for disapproving a voting change under Section 5, regardless of the purpose underlying that change. This Court has recognized as much. See *City of Richmond* v. *United States, supra*, 422 U.S. at 372. See also *City of Petersburg* v. *United States, supra*, 354 F. Supp. at 1027. And in any event, the record amply supports the district court's ruling that appellants failed to sustain their burden of proving that the 1972 changes were enacted without a discriminatory purpose.

2. In *Washington* v. *Davis, supra,* and in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court offered guidance concerning the methods by which discriminatory intent may be proved. The Court stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington* v. *Davis, supra,* 426 U.S. at 242. Additional pertinent factors may be the "historical background" of the disputed legislative or administrative action, the "specific sequence of events leading up to the challenged decision," and the "legislative or administrative history" of the action in question. *Village of Arlington Heights, supra,* 429 U.S. at 267-268. Of course, *Washington* and *Arlington Heights* both involved alleged violations of the Equal Protection Clause. Plaintiffs raising such a claim bear the burden of showing the existence of discriminatory intent. In declaratory judgment actions under Section 5 of the Voting Rights Act, by contrast, plaintiffs bear the burden of showing the *lack* of such intent.

The district court in the present case properly focused on the criteria listed in *Washington* and *Arlington Heights* in determining whether appellants carried their evidentiary burden. The court found that the shift to at-large elections occurred "shortly after black residents of Wilkes County began to register to vote in substantial numbers" (J.S. App. 10a). The court also found that the 1972 changes "were made without the consultation of representatives of the black community" (*ibid.*). Appellants assert (J.S. 8, 9) that the at-large election system was adopted in order to comply with the "one person, one vote" principle, but the district court observed that a properly apportioned single-member district system

also would have satisfied the "one person, one vote" requirement and could have achieved that goal without diminishing black voting strength. Indeed, the court found that appellants could have devised a fairly drawn district plan in which the black population percentage in one district would have been as high as 71% (J.S. App. 10a). Appellants offered absolutely no explanation for their decision to favor at-large elections over all other possible schemes by which "one person, one vote" problems could have been eliminated.[13] Under these circumstances the district court correctly concluded that appellants failed to prove that the 1972 voting changes were adopted without a racially discriminatory purpose.

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[13]For the first time in this Court, appellants suggest (J.S. 11 n.3) that it would have been impractical to create single-member districts of equal population in Wilkes County because "Georgia counties are divided geographically and for voting purposes on a militia district basis" and maintenance of a fairly apportioned single-member district system "would require decennial revision of election district lines along an entirely different basis than militia districts, which now are organized without regard to population." The short answer to appellants' eleventh hour explanation is that it was never presented to the district court. Appellants did not argue below that the shift to at-large voting was intended to preserve the militia district organizational structure and simultaneously to satisfy the "one person, one vote" standard. They may not raise that contention now in an effort to remedy their earlier failure to adduce sufficient evidence of their lack of discriminatory intent.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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